1960

Budget System, Inc. v. Budget Loan and Finance Plan : Abrief of Appellant

Utah Supreme Court

Mulliner, Prince & Mangum; Attorneys for Respondent;

IN THE SUPREME COURT OF THE STATE OF UTAH

BUDGET SYSTEM, INC.,
Plaintiff and Respondent

vs.

BUDGET LOAN AND FINANCE PLAN,
Defendant and Appellant.

Case No. 9224

Appeal from the Third Judicial District Court,
In and For Salt Lake County, State of Utah
Honorable Stewart M. Hanson, District Judge

BRIEF OF THE RESPONDENT

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IN THE SUPREME COURT OF THE STATE OF UTAH

BUDGET SYSTEM, INC.,
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BUDGET LOAN AND FINANCE PLAN,
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Appeal from the Third Judicial District Court,
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Honorable Stewart M. Hanson, District Judge

BRIEF OF THE RESPONDENT

INTRODUCTION

This is an action by respondent to enjoin appellant from using the word "Budget" in its finance business in the Salt Lake City area. The trial court granted the injunction. Damages were waived by respondent.

Appellant in its brief raises four points wherein it is argued that the trial court erred. All four points attack

Findings of Fact 11 and 12. R. 187) Their position is that the court erred in making these Findings, and the position of respondent is that both such Findings are supported by competent evidence.

STATEMENT OF FACTS

Mr. Hugh Barker and wife commenced a small loan business in Salt Lake County in 1928 under the name and style of "Budget System" and operated such business continuously as individuals or as a corporation. In early 1957 they incorporated the present respondent as "Budget System, Inc." Shortly thereafter they entered into an option agreement with American Co-Op Finance Company for the purchase of all the stock of Budget System, Inc. American Co-Op exercised the option in the summer of 1957, and has operated this corporation continuously since that time.

The holding company of appellant formed a corporation called "Budget Loan and Finance Company" in 1948. They operated under this name for a short time in 1949, after which no business was done with the public in the name of Budget Loan and Finance until the latter part of 1958, at which time a finance business being operated in the name of "Credit Finance" changed its name to "Budget Loan and Finance Plan" and actively solicited business in that name.

After the name change referred to above, large neon signs were erected on the premises of appellant located on the southwest corner of State Street and 8th South Street,

one-half block to the north of respondent's offices. The change in name, signs and other advertising caused the trouble complained of by respondent, the nature of which will be set out in more detail in the argument herein.

Personnel representing appellant discussed purchasing the name "Budget System" with the Barkers and officers of Budget System for ten or eleven years prior to the time of trial. The first such offer was made by Mr. Charles Offer, president of Budget Finance Plan, in 1948. (R. 42-43) After negotiations had started with American Co-Op for the purchase of Budget System stock, Mr. Gibbs, resident manager of appellant, inquired as to the possibility of purchasing the name "Budget System" for $10,000.00. (R. 43-44) After the stock purchase, Mr. Gibbs discussed such a purchase with Mr. Seegmiller. (R. 96) Such discussions were continued after the action was filed. (R. 97) The fact such discussions took place is confirmed by Mr. Gibbs. (R. 136)

In negotiations with Mr. Barker for the purchase of Budget System stock, officers of respondent were told by Mr. Barker that he had recently had an offer to purchase the name "Budget System" from appellant for $10,000.00. Because of this offer, there was inserted in the option to purchase the stock of Budget System, Inc., a provision that Mr. Barker would retain an option to repurchase the name "Budget System" or "Budget System, Inc.," for the sum of $6,000.00 prior to August 27, 1957. (Ex. P-1) There was an oral understanding in connection with this option granted Mr. Barker that if he made such a sale of

the name to appellant for a sum in excess of $6,000.00, then such excess would be divided equally between Mr. Barker and the purchasers of the stock of Budget System. (R. 49-50)

In the sale of the stock of Budget System by Barker, the name "Budget System" was assigned a value of $6,000.00 and the seller warranted that he was the lawful owner of the name "Budget System" and the good will related thereto, and had the exclusive right to its use in the State of Utah. (Ex. P-1)

The important evidence on this subject is contained in a letter from J. S. Monosson, house counsel for Budget Finance Plan (the holding company of appellant) written December 5, 1957, to persons who purchased the Budget System, Inc., stock. In this letter counsel recites the fact that it was his understanding that there had been a sale of the office of Budget System in Salt Lake City, Utah. He states that his organization has two subsidiary corporations doing a finance business in Salt Lake City under the name of Credit Finance Plan, and continues by saying that his organization has not been able to utilize the name used by other offices in his chain, i. e., Budget Finance Plan, Budget Loan and Finance, by reason of the fact that the name "Budget System" was preempted by Mr. Barker in Salt Lake City, Utah. He then goes on to ask consent to the use of the name "Budget Finance Plan" in Utah. (Ex. P-11)

During 1949 when Budget Finance and Loan started business at 802 South State Street in that name, consid-

erable confusion resulted. Mr. Barker characterizes this confusion in the following language:

> "When they first came in it nearly drove us nuts on telephone calls and that sort of disturbance . . . We had a lot of misdirected mail." (R. 37)

This confusion resulted in his threatening suit and making complaints to the banking department, so appellant's representatives desisted from the use of the name "Budget" in their finance business. (R. 38)

Confusion by reason of the similarity of the two names commenced in January and February, 1959, as testified to by Mrs. Nichols (R. 79), Mr. Smith (R. 64-67). Both Mr. Gibbs and Mr. Seegmiller, managers of the respective finance companies, testified that the confusion increased as soon as the signs were erected on the offices of appellant. (R. 90, 129)

Prior to trial, the outstandings of respondent were over $100,000.00. A stock registration had been approved for the public sale of stock of American Co-Op Finance at the time of trial, and it was reliably anticipated that more than $250,000.00 would be available from this stock issue and bank credit for use in respondent's business in the year 1960. To put this money out in loans would require advertising. Advertising and credit policies of respondent had been interfered with because advertising money spent by respondent under existing conditions would help appellant more than respondent because of the former's corner location. (R. 109) (Ex. P-16)

None of the foregoing facts are disputed.

STATEMENT OF POINTS

Point I.

FINDINGS OF FACT 11 AND 12 ARE SUPPORTED BY COMPETENT EVIDENCE AND BY THE WEIGHT OF THE EVIDENCE.

ARGUMENT

Point I.

FINDINGS OF FACT 11 AND 12 ARE SUPPORTED BY COMPETENT EVIDENCE AND BY THE WEIGHT OF THE EVIDENCE.

There is no dispute with regard to any of the Findings of Fact made and entered by the trial court except Findings of Fact number 11 and number 12. They provide:

> "11. That the use of the word 'Budget' in the name of defendant since November 1958 has caused and will continue to cause confusion and deception to the public in the Salt Lake City area among present and potential customers therein. That the similarity of said names is a deceptive use by defendant, an unfair trade practice, and has and will result in probable damage to plaintiff's business.
>
> "12. That the use of said name has worked to the injury of plaintiff in an undeterminable amount and if continued will result in further and increased prejudice to plaintiff's business. That plaintiff herein waives the allowance of pecuniary damage herein."

Appellant contends: (a) that the use of the two names and businesses located as they are resulted in no con-

fusion, and (b) that the word "Budget" is a generic term and, therefore, not entitled to be protected by one organization as against its use by another organization engaged in similar activities.

Respondent's position is, briefly, that they proved by a preponderance of the evidence two facts which entitled them to the relief granted by the trial court. These facts are:

(a) That shortly after the use by appellant of the word "Budget" in its name confusion developed and would continue to exist by reason of such use of the word "Budget."

(b) That the word "Budget" when used in the name of competing businesses is of a class which entitled the first user to its exclusive use.

The evidence supporting the two facts mentioned above will now be presented separately.

(a) THAT SHORTLY AFTER THE USE BY APPELLANT OF THE WORD "BUDGET" IN ITS NAME CONFUSION DEVELOPED AND WOULD CONTINUE TO EXIST BY REASON OF SUCH USE OF THE WORD "BUDGET".

A log was kept of the misdirected calls received at the office of respondent. (Exhibit P-8) This log, when considered with the testimony of Mrs. Nichols, stands uncontradicted and is that there were 108 instances of misdirected calls and customers during the 22 working days of July, 1959. This office girl also testified that in each case of misdirection it became necessary to

1. Check their Cardex system.
2. Check their loan pockets.
3. Check Mr. Barker's old accounts.
4. Render a lengthy explanation involving the mixup.
5. Return payments, etc., to appellant by mail and personal delivery. (R. 79)

Mr. Smith, the manager in the early part of 1959, testified that there were a lot of misdirected phone calls, mail payments and customers. (R. 64) Also that one misdirected phone call required he or his assistant to examine the complete filing system, current, past, and back into Barker's records. (R. 64)

Mr. Gibbs, the manager of appellant, admits this existing confusion by testifying as follows:

"Q. Has there been in your experience any confusion between your organization and Budget System since you started doing business the latter part of 1958 in the name of 'Budget Loan and Finance'?

"A. Well, there is no confusion other than the routine things that we have mentioned up until the time we put up the signs as I stated in my deposition.

"Q. And did confusion develop then?

"A. Yes, it did." (R. 129)

"Q. As you said before, any confusion that has resulted in the office of the Budget System or in your office you feel is because of the use of the two names 'Budget' in both institutions' names?

"A. That and their location." (R. 130)

The latter quotation was made during the taking of Mr. Gibbs' deposition.

Mr. Seegmiller outlined the procedures used by the various finance companies before making loans to prospective customers. (R. 88) In the loan applications the prospective borrower is required to indicate any finance company that has made such borrower loans in the past, and also any finance companies to which he was presently in debt. The finance company then investigated directly by telephone with each finance company appearing in the application and in so doing they used the membership of the Lender's Exchange. (Ex. P-14) On Exhibit P-14 respondent company is nearer the top of this schedule of local finance companies than is appellant which would account for large numbers of misdirected telephone calls. This would be expected to be increased with the expansion of the business of both institutions.

The colored photos, Exhibits P–3, P–4, P–5 and P–6, show the illuminated signs on both sides of appellant's building and indicate the extent that the word "Budget" is emphasized as compared with the other words in the full title of appellant.

Exhibit D–9 indicates the same facts with regard to respondent.

Confusion of any and all types is to be expected by reason of these similar activities emphasizing the same

word in their titles operating a mere 100 yards from each other.

(b) THAT THE WORD "BUDGET" WHEN USED IN THE NAME OF COMPETING BUSINESSES IS OF A CLASS WHICH ENTITLED THE FIRST USER TO ITS EXCLUSIVE USE.

The thinking of appellant's officers with regard to the significance of the word "Budget" seems to have changed quite suddenly. For nearly ten years prior to the trial of this action, negotiations had been off and on with regard to the purchase of respondent's name for a substantial amount of money. (R. 43-44, 39, 48-50, 96, 97, 114, 136, Ex. P–1, P–2, P–11) This kind of talk was still being maintained after the suit was filed. (R. 97) Finally, appellant's legal counsel, as late as December 5, 1957, quite candidly admits that those in control of appellant's organization have been unable to utilize the name used by other offices in their chain by reason of the fact that the name "Budget System" was preempted by Mr. Barker in Salt Lake City. (Ex. P–11) "Budget" is the only common word in the name of respondent and in the name of appellant's organization. This attorney is conversant with the meaning of words. The word "preempted" is defined by Webster as "a taking beforehand to the exclusion of others." This admission of the general counsel for appellant coincides with the decision reached by the trial court and should conclude this matter.

The evidence conclusively indicates that appellant's representative were of the opinion that the name was of such a character as to be subject to protection. Respond-

ent's testimony presented by Mr. Barker indicates that this name was protected for 32 years in the Salt Lake area successfully and at the time he sold, it was worth a substantial sum of money for which he was paid. (R. 39) Respondent, as early as 1949, was successfully stopped by Mr. Barker from using the word "Budget" in its name. (R. 38) To all intents and purposes representatives of appellant found that they could not successfully use the word "Budget" while Mr. Barker was connected with Budget System, but after he parted with it, concluded that they could get away with it while it was under the control of respondent.

The cases, and particularly those decided more recently, fully support the result reached by the trial court. The most significant and carefully considered decision is contained in an opinion by the Idaho Supreme Court in the case of *Cazier* v. *Economy Cash Stores, Inc.*, 228 P. 2d 436 (1951). The two names involved in this action were "Economy Grocery" and "Economy Cash Stores, Inc.," located in Burley, Idaho. The action was brought to restrain defendant from doing business under its trade name on the ground of confusing similarity to that of plaintiff. The trial court enjoined defendant from so doing but the injunction was held to be too broad and the Supreme Court of Idaho enjoined defendant from using the word "Economy" in its name. The writer has found no case where more similarity of words involved could be found than "Economy" and "Budget." There were not as many misdirected matters in the Economy case as in the case at bar. Plaintiff had been doing business for

more than 18 years prior to the action. The evidence showed that after defendant had commenced using the name, plaintiff experienced some difficulty in receiving merchandise which was misdirected between the two. Each party received letters which were intended for the other and advertising was confusing. Many people thought plaintiff owned both stores and payments were misdirected. Defendant presented six assignments of error which were substantially the same as those presented by appellant here. These were:

> (1) The failure of the Court to find that business of plaintiff suffered by defendant's use of its name.
>
> (2) Failure to find that the public would be imposed upon.
>
> (3) Failure to find that defendant had attempted or was attempting to palm off its goods.
>
> (4) Failure to find that the trade name of plaintiff had acquired a secondary meaning.
>
> (5) Failure to find that defendant was engaged in unfair competition.
>
> (6) That a finding of confusion alone is not sufficient to support a judgment for injunctive relief.

Each of the six objections made by defendant in this Idaho case was made by appellant in the trial court or in this court. The Idaho court laid down the following rules of law with regard to each:

(1) That in this type of case it is not necessary to support an injunction to show that the first trader suf-

fered damage. It cites *Bernstein* v. *Friedman,* 160 P. 2d 227, wherein the Wyoming Supreme Court states:

> "The cases seem to be clear that it is not necessary to show actual damages in cases like that before us."

The Court adopts the language in *Lanahan* v. *John Kissell & Son, CCA,* 135 F. 899 at 903.

> "It must be apparent that in a case such as before us, it would be ordinarily difficult to prove actual damages, and a plaintiff would be substantially remediless, if he could not be protected by an injunction except where actual damages in dollars and cents were shown."

Other authority is also cited.

(2) "It is not necessary to show that the public would be imposed upon." Numerous cases cited.

(3) It is not necessary that plaintiff prove that defendant was attempting to palm off its goods as those of plaintiff.

> "Where there is no showing in the record of palming off, its absence does not undermine the finding of unfair competition. Champion Spark Plug Company v. Sanders, 331 U. S. 125, 67 S. Ct. 1136, 91 L. Ed. 1386."

(4) Plaintiff by long use had acquired a secondary meaning of a trade name.

> "What constitutes secondary meaning of a trade name is a question of fact. 52 Am. Jur. 557, Sec. 77; 150 A. L. R. 1082. The court did find that respondent had used his trade name in the

particular area since the month of September, 1930, and that the appellant had used its corporate name in the same trade area since June 5, 1948. *Where a party uses a trade name for a long time it is evidence, though not conclusive, of the secondary meaning of the term.* Bernstein v. Friedman, supra; see also 150 A. L. R. 1087, at page 1089. The court, by implication, at least, made a finding that the respondent's trade name had acquired a secondary meaning. National Shoe Corporation v. National Shoe Mfg. Co., Inc., supra."

"*Evidence of actual confusion and deception on the part of customers is not readily available, often difficult to secure and is not always necessary where the similarity of names in itself suggests confusion.* Gehl v. Hebe Co., 7 Cir., 276, F. 271." (Emphasis supplied)

(5-6) Confusion is a question of fact. Cases cited.

"*A showing of confusion, present or probable, is sufficient to justify injunctive relief where a trade name has acquired a secondary meaning.* In the case of American Home Benefit Ass'n., Inc. vs. United American Benefit Ass'n, supra, this court held that *it is not necessary that the complainant show specific instances where confusion, or deception, or both,* as a basis of injunctive relief; *it is sufficient to show probable confusion or that the use of a deceptively similar name is likely to lead to confusion.* This court in so holding cited from 63 C. J., pp. 396 and 397, as follows: "* * * in order to make out a case of unfair competition, it is not necessary to show that any person has been actually deceived by defendant's conduct and led to purchase his goods in the belief that they are the goods of plaintiff or to deal with defendant thinking he was dealing with plaintiff; *it is sufficient to*

show that such deception will be the natural and probable result of defendant's acts.''

''The cases are very numerous where relief has been afforded upon the ground of unfair competition against a deceptive use of generic or descriptive names and marks, personal, geographical, corporate, and other names, none of which are capable of exclusive appropriation as technical trademarks.''

The more recent decisions hold that in a case of this kind, i. e. involving similarity in name, actual competition between the parties involved need not be shown. 148 A.L.R. 12.

Examples where injunctions were granted are *Lincoln Motor Company* v. *Lincoln Auto Company,* 44 F. 2d 812; *Investors Syndicate* v. *Hughes,* 38 NE 2d 754, Ill. In this case the court stated that the more modern test has been ''less emphasis on competition and more on confusion.'' *Standard Accident Insurance Company* v. *Standard Surety and C. Company,* 53 F. 2d 119, where it was held the names were confusingly similar, therefore objectionable, *even though there was no competition because they were engaged in different lines of insurance.* The latter case is particularly significant in view of the introduction of the classified section of the telephone book where counsel took the position that ''budget'' was in the same category with ''continental'' and ''general.'' It would seem that ''standard'' more nearly conforms to these terms than does ''budget.''

There is an annotation in 66 A. L. R. 949 entitled "Protection of business or trading corporation against use of same or similar name by another corporation."

At 66 A. L. R. 954 the rule is stated: "It is generally held in accordance with the rule applied in the case of trade names that if there is sufficient similarity to deceive, it is not necessary to establish a fraudulent intent in the use of the name."

At 66 A. L. R. 967 the rule with relation to closely related lines is stated to be: "Where the companies are engaged in lines of business which form a part of the same general commercial field, and are so closely related that simulation of a name by one is likely to result in injury to the other, *it has been held that the general rule does not apply, and that.. relief will be granted, even though the companies are not, strictly speaking, engaged in competition.*"

Names of cases supporting this rule are: *Long's Hat Stores Corporation* v. *Long's Clothes,* 231 N. Y. Supp. 107, which held that good will of the older company might be affected because a hat business and a retail clothing business were closely related. *Bush Terminal Company* v. *Bush Terminal Trucking Company,* 206 N. Y. Supp. 2. These names were held to be confusing even though the companies were in different lines of business.

At 66 A. L. R. 972 the rule as stated is "actual confusion need not be shown, but it is sufficient to show that

confusion is probable or likely to occur. This rule is universally recognized.

In the following cases the names were held to be so similar that relief was granted:

Atlas Assurance Company - Atlas Insurance Company, 112 N. W. 232; *Iowa Auto Market - Auto Market and Exchange,* 197 N. W. 321; *Buick Motor Co. - Buick Used Motors,* 229 N. Y. Supp. 3; *M. M. Newcomer Company - Newcomer's New Store,* 217 S. W. 822; *Albany Savings Bank - Albany City Savings Bank,* 190 N. Y. Supp. 334, both banks located in the same city; *International Trust Company - International Loan and Trust Company,* 26 N. E. 693, Mass.; *Lloyd Bank, Limited - Lloyds Investment Trust Company,* 28 Times L. R. 379, England; *Accident Insurance Company, Limited - Accident, Disease, and General Insurance Corporation Limited,* 54 L. J. Ch. N. S., England. The court indicated in this case that the result would probably have been different if the word "accident" was not the first word in each name; *Armington & Sims Company - Armington & Sims Engine Company,* 42 Atl. 308, 27 A. L. R. 1024; *B. Forman Company - Forman Manufacturing Company, Inc.* Here both companies dealt in the retailing of furs and the second companies proposed to establish its store only a few doors distance from that of the first company, 125 N. Y. Supp. 597; *Backus Oil Company - Backus Oil and Car Grease Company,* 8 Ohio 93; *Eureka Fire Hose Company - Eureka Rubber Manufacturing Company,* 60 Atl. 561; *Hudson Tire Company, Inc. - Hudson Tire and Rubber Company,* 276 F. 59; *Kansas City Real Estate and*

Stock Exchange-Kansas City Real Estate Exchange, 5 S. W. 29; *Lamb Knit Goods Company-Lamb Glove and Mitten Company,* 78 N. W. 1072. Factories here were located in different towns, but the business was done mainly through agents and there were many instances of confusion; *Materialmen's Mercantile Associated, Limited - New York Materialmen's Mercantile Association, Inc.,* 155 N. Y. Supp. 706. Both businesses were located in New York and conducted by soliciting agents. The fact that the offices were located in different parts of the city was held not to insure against confusion; *McFell Electric Co. - McFell Electric and Telephone Co.,* 110 Ill. App. 182; *McVey Seed & Floral Co. - G. B. McVey & Sons Seed Company, Inc.,* 79 So. 116; *Pansy Waist Company - Pansy Dress Co.,* 196 N. Y. Supp. 825; *Planters' Fertilizer & Phosphate Co. - Planters' Fertilizer Co.,* 133 S. E. 706; *United States Mercantile Reporting & Collecting Association - United States Mercantile Reporting Company,* 21 Abb. 115 N. Y.; *Van Aucken Steam Specialty Co. - Van Aucken Company,* 57 Ill. App. 240; *King's Seafood - King of the Sea,* 70 N. Y. S. 2d 702; *Empire Trust Company - Empire Finance Corporation,* 41 S. W. 2d 847; *American Radio Stores, Inc. - American Radio & Television Stores Corp.,* 17 Del. Ch. 127, 150 A. 180, where the court observed that the words "radio" and "stores" were purely descriptive and so not appropriable, but the addition of the word "American" was a distinguishing mark, in the use of which claimant was entitled to be protected; *Barber & Co., Inc. - Barber Co., Inc.,* 277 N. Y. 55, 12 N. E. 2d 790, 115 A. L. R. 1236; *Churchill Downs, Inc. - Churchill Downs Distilling Co.,* 90 S. W. 2d 1041;

Economy Food Products Co. - Economy Grocery Stores Corp., 183 N. E. 49. The court held the names were too similar, but denied relief on the ground of laches; *Home Insulation Co. - Home & Building Insulation Co.*, 52 P. 2d 1065, Okla.; *Peerless Laundry Co. - Peerless Service Laundry, Inc.*, 161 Atl. 832; *Personal Finance Company of Lincoln - Personal Loan Service*, 275 N. W. 324, Nebr.; *Standard Oil Co. of Calif. - Standard Oil Co. of New Mexico*, 56 F. 2d 973, CCA 10th. The court observed that there could be no doubt that if defendant were permitted to engage in the petroleum business, third persons would deal with defendant thinking they were dealing with plaintiff; *Standard Oil Co. of New York - Standard Oil Co. of Maine*, 45 F. 2d 309, CCA 1.

None of the titles in the cases cited by appellant are particularly similar. Certainly they are not as similar as those involved here and illustrated by the citations quoted above. A possible exception is the case of *Federal Securities Company* v. *Federal Securities Corporation*, 276 Pac. 1100 (Ore.). This is an old case, having been decided in 1929. The trial court found that the plaintiff's business was practically all retail while the defendant's business was practically all wholesale. It also appeared that when the Commissioner observed that confusion might arise through the similarity of defendant's name with that of plaintiff, the defendant readily acquiesced in his suggestion that the words "of Illinois" be added to its name. This addition certainly points up a distinction.

An explanation is in order as to why respondent did not attempt to prove damages. This failure to prove

damages is not fatal as indicated in the cases cited above. The chief reason in this case for not attempting to prove them arose from the following set of circumstances. Obviously the amount and extent of interference must be proved from the books and records of appellant. The records that would best illustrate this would be loan applications which resulted in approval or denial of loans, inasmuch as these records would show whether or not loan applicants had been previous customers of respondent. In the answer of appellant to respondent's interrogatories they reported that this information was not available. Plaintiff's interrogatory No. 12 (R. 11) asked for this information. The answer was "None that we know of." (R. 24) Toward the end of the trial, however, appellant's manager, Mr. Gibbs, indicated that this information was available when he testified that he kept all applications whether they resulted in loans or not from six to twelve months. (R. 169) His reason for not presenting these records appears to be that it would have necessitated his going through some 1200 loan pockets besides the applications that had been turned down. (R. 170-171) Counsel for respondent was justified in assuming that the answers to interrogatories were correct. Mr. Gibbs' testimony indicated these answers were in error during the last few minutes of the trial.

Respondent was and is prepared to expend a large sum of money in acquiring new licenses and advertising, and are unwilling to do so when the result would benefit its competitor, the appellant herein. The only other alternative, if this projected means of doing buiness is under-

taken, is to change the name of the respondent. If this were done, respondent would lose the good will created by its name which was created by 28 years of service to hundreds of customers. So, if the trial court is not sustained, future damage to respondent is a certainty.

Finally, the reason it is not necessary to prove damages in this type of action in order to prevail, is that arriving at an amount that is anywhere near correct and which is not highly speculative is practically impossible.

Appellant argues that because the Bank Commissioner of the State of Utah permitted the change of name from Credit Finance Plan to Budget Loan and Finance Plan, that they are entitled to continue business in that name. It asks this court to presume that an investigation was made by the Commissioner. There is no evidence that an investigation was made and the fact is that there was not. Matters involving unfair trade practice are administered by the courts generally, and in some particular instances by commissions set up for this sole purpose. This type of matter is no concern of public authorities vested with the power to issue licenses or permits. It is universally held that the granting of a charter or certificate of incorporation or license does not entitle one party to use a trade name to the detriment of another using a similar name. 66 A.L.R. 1014, 115 A.L.R. 1252.

Some point is also made that Mr. Barker abandoned the name "Budget Finance." The only business he did in this name was flooring a few cars and this particular company had no lending license and did not have a bank

account. (R. 56) The positive testimony of Mr. Barker is that by filing affidavits he intended to protect the word "Budget." (R. 57) There was no question of abandonment involved in this case. No issue was made on this subject in the pleadings or pretrial order. The positive evidence is exactly to the contrary as evidenced by the option to purchase the stock of Budget System, (Ex. P-1) wherein Mr. Barker warrants the exclusive use of the name in the State of Utah for a consideration of $6,000. The fact of abandonment depends upon the intent of the person involved.

CONCLUSION

Practically all the testimony submitted in behalf of respondent had as its purpose the sustaining of Findings of Fact numbers 11 and 12. Respondent's evidence in support of these two Findings of Fact was also supported by the manager of appellant, and by the legal counsel of appellant. The only real issue in this case is whether the similarity of names has resulted in confusion or is likely to result in confusion. The manager of appellant freely admitted that when the signs were put on the building confusion commenced. Counsel for appellant admitted in writing that the use of the word "Budget" had been "preempted" by respondent's predecessor in title in the Salt Lake area. There is no evidentiary conflict on the real issue in this case. Appellant attempts to initiate such a conflict by argument.

This particular case involves a factor not usually found in this type of litigation. The evidence is uncon-

tradicted that respondent has available a considerable amount of money which it intends to use to expand its business. It has been unable to do so for more than a year because of the insistence of appellant in continuing to use a similar name. Pecuniary injury, therefore, has developed since the institution of this litigation, and particularly since judgment was rendered in the trial court. Appellant has posted a bond pursuant to the order of the court for the purpose of staying its execution and securing the payment of damages and injury pending this appeal. (R. 191)

There being no disagreement as to the facts that warrant the conclusion of the trial court, it is respectfully submitted that its judgment should be sustained.

Respectfully submitted,

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